No. 88-1433

FILED
APR 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

CHARLIE JOE VAUGHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner's five convictions for possession of cocaine with intent to distribute it must be merged in a single sentence where each count charged possession on a specific and different date, where the purity of the cocaine petitioner sold on each of the five occasions was different, and where there was neither a charge nor evidence of a continuing possession of only one batch of cocaine.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	3
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Ball v. *United States*, 470 U.S. 856 (1985)	7
Hill v. *United States*, 368 U.S. 424 (1962)	7
United States v. *Acosta*, 763 F.2d 671 (5th Cir.), cert. denied, 474 U.S. 863 (1985)	4
United States v. *Blakeney*, 753 F.2d 152 (D.C. Cir. 1985)	4
United States v. *Fiallo-Jacome*, 784 F.2d 1064 (11th Cir. 1986)	5
United States v. *Griffin*, 765 F.2d 677 (7th Cir.), cert. denied, 431 U.S. 964 (1985)	4
United States v. *Jones*, 533 F.2d 1387 (6th Cir. 1976)	6
United States v. *Maldonado*, 849 F.2d 522 (11th Cir. 1988)	5
United States v. *Mathis*, 673 F.2d 289 (10th Cir.), cert. denied, 457 U.S. 1120 (1982)	4
United States v. *Palacios*, 835 F.2d 230 (9th Cir. 1987)	5
United States v. *Palafox*, 764 F.2d 558 (9th Cir. 1985)	4, 5
United States v. *Privett*, 443 F.2d 528 (9th Cir. 1971)	4
United States v. *Reed*, 647 F.2d 678 (6th Cir. 1981)	6
United States v. *Rich*, 795 F.2d 680 (8th Cir. 1986)	4
United States v. *Rodriguez-Ramirez*, 777 F.2d 454 (9th Cir. 1985)	4, 5
United States v. *Wolf*, 813 F.2d 970 (9th Cir. 1987)	5
United States v. *Woods*, 568 F.2d 509 (6th Cir.), cert. denied, 435 U.S. 972 (1978)	6

Statutes and rule: Page

21 U.S.C. 841(a)(1) 2
28 U.S.C. 2255 7
Fed. R. Crim. P.:
Rule 35 7
Rule 35(a) 2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1433

CHARLIE JOE VAUGHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-11) is reported at 859 F.2d 863. The order of the district court (Pet. App. 3-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 4, 1988. The petition for a writ of certiorari was not filed until ~~February 27~~, 1989, and is therefore out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Georgia, petitioner was convicted on five counts of possessing cocaine with intent to distribute it and one count of possessing methaqualone with

intent to distribute it, all in violation of 21 U.S.C. 841(a)(1). He was sentenced to consecutive terms of five years' imprisonment on each of the cocaine counts, five years' probation on the methaqualone count, a special parole term of 15 years, and a $55,000 fine. The court of appeals affirmed. 736 F.2d 665 (1984). In March 1987 petitioner moved for correction of his sentence under Fed. R. Crim. P. 35(a). The district court summarily denied the motion, Pet. App. 3-4, and the court of appeals affirmed, Pet. App. 5-11.

The evidence at trial, which is summarized in the government's brief on petitioner's direct appeal (Gov't C.A. Br. 2-8), showed that five times between March 9 and May 2, 1983, petitioner sold varying amounts of cocaine to the two informants and an undercover agent. The first of the five charged acts of cocaine possession occurred on March 9, when petitioner sold an informant and the undercover agent a package containing 7.1 grams of 87.5 percent pure cocaine at his home in Emanuel County, Georgia. On March 23 petitioner sold the two men another package containing 6.9 grams of 68.8 percent pure cocaine, which he delivered to an informant's place of business in Metter, the county seat of Candler County, Georgia. On April 7 petitioner returned to Metter to give the informant and agent 14.5 grams of 62 percent pure cocaine. Later that month, on April 27, petitioner sold 7.2 grams of cocaine in Emanuel County. The purity of that cocaine was never determined. Finally, on May 2 petitioner arranged to sell an informant two ounces of cocaine. Agents arrested petitioner in Stillmore, Georgia, in the midst of the negotiations and seized a bottle and two packages of cocaine from petitioner's automobile. The bottle and the packages contained between 21.1 grams and 30.3 grams of cocaine of a purity ranging from 40 percent to 50.4 percent.

Following his arrest agents searched petitioner's residence and found notebooks containing 25 to 30 pages of notations of what appeared to be drug transactions, as well as other papers containing similar records. In a car parked outside the residence, the agents found a plastic bag containing 1,001 methaqualone tablets.

ARGUMENT

1. Petitioner contends (Pet. 6-27) that he was improperly given multiple consecutive sentences for what he argues was a single continuing possession of cocaine.

Petitioner's position rests entirely on his assertion that he was "sentenced five times for the continuous possession of the same quantity of cocaine" (Pet. 13). In fact, there is no evidence that petitioner was in continuous possession of the same quantity of the drugs. To the contrary, the evidence of the varying purities of the cocaine he distributed provides a firm basis for the opposite conclusion.

The indictment in this case charged five separate acts of possession with intent to distribute cocaine—on March 9, 1983 (Count 1), on March 23, 1983 (Count 2), on April 7, 1983 (Count 3), on April 27, 1983 (Count 4), and on May 2, 1983 (Count 5). The cocaine that petitioner distributed on three of the four dates in March and April was of different purity (the cocaine that petitioner distributed on April 27 was not tested for purity), and the cocaine samples that were discovered in petitioner's automobile upon his arrest on May 2 were not of the same purity as any of the earlier quantities he sold. Thus, the evidence supported the conclusion that petitioner did not simply possess one batch of cocaine over the six-week period, but that he possessed different batches of cocaine during that period from which he sold portions to the informant and the undercover agent. Under similar circumstances, the

courts of appeals have uniformly held that it is proper to charge the separate possessions in separate counts and to subject the defendant to cumulative penalties. See, *e.g.*, *United States* v. *Rich*, 795 F.2d 680, 682-683 (8th Cir. 1986); *United States* v. *Rodriguez-Ramirez*, 777 F.2d 454, 457-458 (9th Cir. 1985); *United States* v. *Griffin*, 765 F.2d 677, 680, 682-683 (7th Cir.), cert. denied, 431 U.S. 964 (1985); *United States* v. *Acosta*, 763 F.2d 671, 689-690 (5th Cir.), cert. denied, 474 U.S. 863 (1985); *United States* v. *Blakeney*, 753 F.2d 152, 154-155 (D.C. Cir. 1985); *United States* v. *Privett*, 443 F.2d 528, 531 (9th Cir. 1971).

The cases on which petitioner relies are either distinguishable or contrary to his position. *United States* v. *Mathis*, 673 F.2d 289 (10th Cir.), cert. denied, 457 U.S. 1120 (1982), involved a single event in which the defendant gave the undercover agent one-quarter ounce of cocaine as a sample, sold approximately one-half pound later that day, and immediately after his arrest for that sale was found to be in possession of 10 grams of cocaine. The government charged one possession with intent to distribute, in light of the evidence that the three different cocaine possessions were part of a single criminal transaction, and the court agreed that the events constituted only one crime. 673 F.2d at 292. There is an obvious difference between charging as multiple offenses the distribution of a single package of cocaine, from which a sample is taken, and charging multiple possessions—in different locations and over a number of weeks—of bags of cocaine that are readily distinguishable from each other by purity. The *Mathis* case, in which the government charged only a single offense, is therefore not helpful to petitioner at all.

Similarly, *United States* v. *Palafox*, 764 F.2d 558 (9th Cir. 1985) (en banc), involved a single event. In the course of selling heroin to an undercover agent, the defendant was arrested after he gave the agent a sample of the drug.

The defendant was thereafter charged with distribution of the sample and possession of the remainder with intent to distribute it. The court of appeals held that only one offense was proved; the court explained that the defendant "should not receive multiple punishments for steps in what in fact amounted to one frustrated delivery of drugs." 764 F.2d at 563. That case obviously does not control a case such as this one, which involved transactions separated in time and place from one another. Indeed, the Ninth Circuit later observed that its decision in *Palafox* is limited to cases in which the distribution of the sample and the possession of the remainder occurred at the same time and the same place. See *United States* v. *Palacios,* 835 F.2d 230, 233-235 (9th Cir. 1987); *United States* v. *Wolf,* 813 F.2d 970, 977 (9th Cir. 1987); *United States* v. *Rodriguez-Ramirez,* 777 F.2d 454, 457-458 (9th Cir. 1985).

The prior Eleventh Circuit cases on which petitioner relies are likewise unhelpful to him. In *United States* v. *Fiallo-Jacome,* 784 F.2d 1064 (11th Cir. 1986), the indictment contained two counts charging the possession of cocaine during overlapping time periods; one count charged possession on May 17 and the other charged possession as a continuing offense from February through May. The court found that both counts seemed to charge a single offense, and the evidence showed only one continuing possession of a single quantity of cocaine. 784 F.2d at 1066-1067. Here, by contrast, the counts are not overlapping and the evidence shows multiple transactions. And *United States* v. *Maldonado,* 849 F.2d 522 (11th Cir. 1988), which petitioner cites in his support (Pet. 15), is entirely consistent with the decision below. In *Maldonado,* a two-count indictment charged the defendant with possession of cocaine on a single date but in two locations—his automobile and his residence—and the court of appeals upheld the separate convictions on those two counts. There

is no principled distinction between that case and the instant one; if anything, *Maldonado* more closely suggests a single event than petitioner's separate and repeated transactions over a number of weeks.

Finally, petitioner relies on a series of Sixth Circuit cases in support of his assertion that the circuits are in conflict on the issue he presents in his petition. But the Sixth Circuit cases on which he relies are all readily distinguishable. In *United States* v. *Woods,* 568 F.2d 509 (6th Cir.), cert. denied, 435 U.S. 972 (1978), the court of appeals vacated the defendant's three separate convictions for possessing heroin with intent to distribute it because all three packages of heroin at issue in the three counts were seized at the same time from a single location and were virtually identical in both weight and purity (568 F.2d at 510-511). That case is obviously inapplicable here, because this case involves the possession and sale of different batches of drugs, not the simultaneous possession of one quantity of drugs that happens to be packaged in several containers.

The decisions of the Sixth Circuit in *United States* v. *Jones,* 533 F.2d 1387, 1392 (1976), and *United States* v. *Reed,* 647 F.2d 678 (1981), are likewise inapposite. *Jones* held that possession of the same handgun on five different dates was a single course of conduct punishable as only one offense. The distinction between the ongoing possession of one item and the possession on different dates of five separate batches of drugs of differing quality is obvious, and is sufficient to distinguish that case from this one. *Reed* involved the simultanous possession and transportation of stolen goods. The court held that multiple convictions could not be upheld in that case based on the fact that the goods had originally been stolen from different persons. Once again, however, that case turned on the fact that the government sought to obtain multiple convictions based on conduct relating to a single quantity of

stolen goods; this case, by contrast, concerns separate transactions involving different batches of drugs.

2. Petitioner also asserts (Pet. 27-34) that the court of appeals improperly placed on him the burden of establishing a single continuous possession, rather than placing the burden on the government to show that petitioner committed multiple drug offenses. Petitioner has not accurately described the way the court of appeals disposed of his claim.

Petitioner did not raise his multiplicity claim on his direct appeal; he raised it only in his Rule 35 challenge to his sentence. It was therefore proper for the court of appeals to impose on petitioner the burden to show that he was entitled to relief from the sentence that had been imposed after trial and affirmed on direct appeal. In order to establish a right to relief, petitioner would have to demonstrate that the evidence did not support the conclusion of the court below that petitioner had in fact committed multiple drug violations. Because the evidence shows just the opposite, the court of appeals properly held that petitioner had failed to meet the burden imposed on him in a proceeding in which he sought to raise a collateral challenge to his convictions.*

---

* We question whether Rule 35 even permits the type of challenge made in this case. Petitioner's real challenge is not simply to his sentence, but to his convictions. See *Ball* v. *United States*, 470 U.S. 856 (1985) (holding that it is improper to convict and concurrently sentence someone for possessing and receiving the same firearm, and that one of the convictions must be vacated). Rule 35 serves only a "narrow function" of correcting an illegal sentence and is not to be used "to reexamine errors occurring at the trial or other proceedings prior to the imposition of sentence." *Hill* v. *United States*, 368 U.S. 424, 430 (1962). But even if petitioner's pleading in the courts below had been treated as a motion for collateral relief under 28 U.S.C. 2255, the analysis of the court of appeals would have been the same, and petitioner would have fared no better.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
SARA CRISCITELLI
Attorney

APRIL 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00213